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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KEVIN SITTO,
CDCR # F-55813

Plaintiff,

vs.

ROGER CARL CHRISTIANSON,

Defendant.

Civil No. 11cv0268 BEN (POR)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE AND GARNISHING
\$350.00 BALANCE FROM
PRISONER TRUST ACCOUNT
[Doc. No. 2];**

**(2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[Doc. No. 3]**

AND

**(3) DISMISSING ACTION
FOR FAILING TO STATE A
CLAIM PURSUANT
TO 28 U.S.C. §§ 1915(e)(2)(B)
& 1915A(b)**

Plaintiff, a state inmate currently incarcerated at High Desert State Prison located in Susanville, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], along with a Motion to Appoint Counsel [Doc. No. 3].

1 **I. MOTION TO PROCEED IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the United
 3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 4 U.S.C. § 1914(a). An action may proceed despite a party's failure to pay only if the party is
 5 granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493
 6 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).
 7 Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in
 8 installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28
 9 U.S.C. § 1915(b)(1) & (2).

10 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
 11 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
 12 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows that
 13 he has insufficient funds from which to pay an initial partial filing fee.

14 Accordingly, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No. 2] and
 15 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further
 16 orders the Secretary of the California Department of Corrections and Rehabilitation ("CDCR")
 17 to garnish the entire \$350 balance of the filing fees owed in this case, collect and forward them
 18 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
 19 § 1915(b)(1).

20 **II. MOTION FOR APPOINTMENT OF COUNSEL [DOC. NO. 3]**

21 Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil
 22 action. The Constitution provides no right to appointment of counsel in a civil case, however,
 23 unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept.*
 24 *of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district
 25 courts are granted discretion to appoint counsel for indigent persons. This discretion may be
 26 exercised only under "exceptional circumstances." *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th
 27 Cir. 1991). "A finding of exceptional circumstances requires an evaluation of both the
 28 'likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se

1 in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and
2 both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*,
3 789 F.2d 1328, 1331 (9th Cir. 1986)).

4 The Court denies Plaintiff’s request without prejudice, as neither the interests of justice
5 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,
6 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

7 **III. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

8 The Prison Litigation Reform Act (“PLRA”)’s amendments to 28 U.S.C. § 1915 also
9 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like
10 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or
11 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
12 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”
13 *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua
14 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,
15 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
16 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
17 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.
18 2000) (§ 1915A).

19 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
20 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28
21 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner’s suit
22 make and rule on its own motion to dismiss before directing that the Complaint be served by the
23 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits,
24 but requires a district court to dismiss an in forma pauperis complaint that fails to state a
25 claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
26 § 1915A).

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1 “[W]hen determining whether a complaint states a claim, a court must accept as true all
2 allegations of material fact and must construe those facts in the light most favorable to the
3 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
4 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). Here, however, even
5 presuming Plaintiff’s factual allegations true, the Court finds his Complaint both fails to state
6 a claim upon which relief can be granted and seeks monetary relief from defendants who are
7 immune. See 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213
8 F.3d at 446, n.1.

9 First, Plaintiff names as the only Defendant Roger Christianson, the attorney who
10 represented him during his criminal proceedings. However, a person “acts under color of state
11 law [for purposes of § 1983] only when exercising power ‘possessed by virtue of state law and
12 made possible only because the wrongdoer is clothed with the authority of state law.’” *Polk*
13 *County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting *United States v. Classic*, 313 U.S. 299,
14 326 (1941)). Attorneys representing criminal defendants during trial and pretrial proceedings,
15 do not generally act under color of state law because representing a client “is essentially a private
16 function ... for which state office and authority are not needed.” *Polk County*, 454 U.S. at 319;
17 *United States v. De Gross*, 960 F.2d 1433, 1442 n.12 (9th Cir. 1992). Thus, when counsel are
18 performing as advocates, *i.e.*, meeting with clients, investigating possible defenses, presenting
19 evidence at trial and arguing to the jury, they do not act under color of state law for section 1983
20 purposes. See *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Polk County*, 454 U.S. at 320-25;
21 *Miranda v. Clark County*, 319 F.3d 465, 468 (9th Cir. 2003) (en banc) (finding that public
22 defender was not a state actor subject to suit under § 1983 because, so long as he performs a
23 traditional role of an attorney for a client, “his function,” no matter how ineffective, is “to
24 represent his client, not the interests of the state or county.”).

25 Accordingly, Plaintiff’s claims against Christianson must be dismissed for failing to state
26 a claim upon which section 1983 relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii) &
27 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

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Moreover, to the extent Plaintiff seeks damages under 42 U.S.C. § 1983 based on the alleged ineffectiveness assistance of his trial counsel, his claim amounts to an attack on the validity of his underlying criminal proceedings, and as such, is not cognizable under 42 U.S.C. § 1983 unless and until he can show that conviction has already been invalidated. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Ramirez v. Galaza*, 334 F.3d 850, 855-56 (9th Cir. 2003) (“Absent such a showing, ‘[e]ven a prisoner who has fully exhausted available state remedies has no cause of action under § 1983....’”) (quoting *Heck*, 512 U.S. at 489), *cert. denied*, 124 S. Ct. 2388 (2004). *Heck* holds that “in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87. A claim challenging the legality of a conviction or sentence that has not been so invalidated is not cognizable under § 1983. *Id.* at 487; *Edwards v. Balisok*, 520 U.S. 641, 643 (1997).

In *Heck*, the Supreme Court held that:

when a state prisoner seeks damages in a section 1983 suit, the district court must consider *whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence*; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff’s action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.

Heck, 512 U.S. at 487 (emphasis added). An action that is barred by *Heck* should be dismissed for failure to state a claim without prejudice to Plaintiff’s right to file a new action if he succeeds in invalidating his conviction. *Edwards*, 520 U.S. at 649.

Here, Plaintiff’s ineffective assistance of counsel claims against Christianson “necessarily imply the invalidity” of his criminal proceedings and continuing incarceration. *Heck*, 512 U.S. at 487. Were Plaintiff to succeed in showing that Defendant rendered ineffective assistance of counsel, an award of damages would “necessarily imply the invalidity” of his

conviction. *Id.*; see also *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (to succeed on ineffective assistance claim petitioner must show that counsel's performance fell below objective standard of reasonableness and that but for counsel's errors the result of the trial would have been different); *Lozada v. Deeds*, 964 F.2d 956, 958-59 (9th Cir. 1992) (remedy for ineffective assistance of counsel is a conditional writ granting petitioner's release unless state retries him or allows him to pursue an appeal with the assistance of counsel within a reasonable time). Thus, because Plaintiff seeks damages for an allegedly unconstitutional criminal proceedings in a criminal case, and because he has not alleged that his conviction has already been invalidated, a section 1983 claim for damages has not yet accrued. See *Heck*, 512 U.S. at 489-90.

Accordingly, the Court finds that Plaintiff's entire Complaint must be dismissed sua sponte for failing to state a claim upon which relief could be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). See *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446, n.1.

III. CONCLUSION AND ORDER

Good cause appearing, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion to Appoint Counsel [Doc. No. 3] is **DENIED** without prejudice.
2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is **GRANTED**.
3. The Secretary of California Department of Corrections and Rehabilitation, or his designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the account in an amount equal to twenty percent (20%) of the preceding month's income and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.
4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate, Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502, Sacramento, California 95814.

1 **IT IS FURTHER ORDERED** that:

2 5. Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state a claim
3 upon which relief could be granted. *See* 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). However,
4 Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which
5 to file a First Amended Complaint which cures all the deficiencies of pleading noted above.
6 Plaintiff's Amended Complaint must be complete in itself without reference to the superseded
7 pleading. *See* S. D.CAL. CIVLR. 15.1. Defendants not named and all claims not re-alleged in
8 the Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565,
9 567 (9th Cir. 1987).

10 Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief
11 may be granted, it may be dismissed without further leave to amend and may hereafter be
12 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79
13 (9th Cir. 1996).

14 6. The Clerk of the Court is directed to mail a form civil rights Complaint to Plaintiff.

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16 DATED: 3/21/2011


17 **HON. ROGER T. BENITEZ**
18 United States District Judge
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